BEFORE THE

COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET
UNITED STATES HOUSE OF REPRESENTATIVES

TESTIMONY OF THE HONORABLE TONY CLARK PRESIDENT, NORTH DAKOTA PUBLIC SERVICE COMMISSION & CHAIRMAN, TELECOMMUNICATIONS COMMITTEE, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS ("NARUC")

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Chairman Upton, Ranking Member Markey and members of the Subcommittee, thank you for the opportunity to testify today. I am Tony Clark, President of the North Dakota Public Service Commission and Chairman of the Telecommunications Committee of the National Association of Regulatory Utility Commissioners (NARUC). NARUC represents State commissions in all 50 States, the District of Columbia and US territories, with jurisdiction over telecommunications, electricity, natural gas, water and other utilities.

This particular hearing is especially important to me because of the impact that Universal Service programs have on rural States like mine. North Dakotans are eager to embrace the power and promise of VoIP, new video services, wireless broadband and other innovative products, but we know that *all* of those technologies require underlying infrastructure: wires, switches, towers and routers – and those require real investment to build and maintain, especially in rural markets.

In his recent book, "The World is Flat," author Thomas Friedman writes about how an interlocking network of undersea optical fiber cables and global satellite connections has, for business purposes, erased the distance between New York, Los Angeles, Bangalore and Beijing, creating new types of both collaboration *and* competition among professionals in every part of the globe. In North Dakota, we like the idea of Fargo, Valley City and even tiny Mandaree (pop. 558, on the Fort Berthold Indian Reservation) being part of that global information economy too – a concept that would be unthinkable without a first class communications infrastructure. So the

Telecommunications Act's promise of reasonably comparable rates and services for high cost areas means a lot to States like mine.

Beyond their economic value, telecommunications networks are also critical infrastructure. As telephone companies in the Gulf Coast region issue press releases now about their readiness for the 2006 hurricane season, we are reminded of how the importance of reliable communications was magnified during past disasters, when first responders and relief organizations had to coordinate thousands of volunteers in real time.

An existential question for USF.

The title of this hearing, "What are we subsidizing and why?" raises a good point, which is that a national dialogue about the purpose and scope of universal service is appropriate as Congress seeks to update many of its communications laws.

We're here today because Universal Service is at a crossroads. On the contribution side, there is a growing chasm between the services and carriers that sustain the fund, and those that interconnect to the network supported by it. The end result is that the contribution requirement is falling ever more heavily, and unfairly, on a shrinking number of carriers. This means that the charge the end user has to pay on interstate and international toll calls has risen to close to 11 percent recently, which is a result of the growing demands on a shrinking revenue base of interstate and international calls. On the distribution side, the Universal Service Fund has grown tremendously in the past few years. These two trends are on a crash course, making the status quo unsustainable.

On both sides, the Universal Service Fund faces a number of existential questions:

- Should it explicitly fund broadband infrastructure and services?
- What is the optimal size of the fund and does it need to be capped?
- Should it fund competition in high cost markets?
- How many networks should it be used to fund in high cost markets?
- On what cost basis should carriers be reimbursed?
- How many access lines per customer should be funded?
- Is it intended for networks or for individuals?
- Should contributions be pegged to network usage, use of numbers, connections or some other methodology?
- Should Universal Service continue to be a shared Federal-State responsibility, or should the federal government take on the entire burden?

Each choice carries both costs and opportunities, and a decision on any one of them will have a ripple effect on all the others. In addition, Universal Service programs are inextricably intertwined with intercarrier compensation and larger impacts on the entire communications market. To be perfectly frank, the costs and benefits of different options will vary from State to State, as will the advice of your individual State commissions, but at the end of the day, we must all find common ground. Each of your home State commissions is an excellent resource for you and your staffs to utilize in researching the impact of universal service on your districts. It is a contact that is well worth making.

On a practical level, NARUC believes that whatever the federal Universal Service Fund is intended to accomplish, it should be done as efficiently as possible. That is why we support a permanent exemption of federal Universal Service programs from the Antideficiency Act.

State designation of Eligible Telecommunications Carriers

Under Section 214(e) of the Act, State commissions help the FCC administer the federal Universal Service Fund by designating eligible telecommunications carriers (ETCs) in each State that receives support. The Act requires a finding that each designated carrier will offer the services supported by Universal Service throughout the service area, through its own facilities or with a combination of its own facilities and resale of another carrier's facilities, and that it will advertise the availability of those services using media of general distribution.

The Act also requires an ETC designation to be consistent with the public interest, convenience and necessity, but did not set forth specific criteria to be applied under the public interest tests in Sections 214 and 254 of the Act. For service areas already served by a rural telephone company, the Act specifically requires a public interest determination to be made before a State commission designates a competitive ETC for that service area.

In some States, standards were interpreted to allow a degree of latitude in ETC designations. Our experience in North Dakota allowed for very little. Prior to my tenure, the Public Service Commission (PSC) once denied ETC status to a competitive applicant, citing the public interest standard and a number of policy concerns, including impact on the federal fund. The carrier sued the PSC, and the court ruled that questions of federal fund sufficiency were outside the scope of any State PSC inquiry. Lacking the ability to take into consideration this factor, the public interest standard became a relatively easy burden for a competitive ETC to meet.

In March 2005, acting on a recommendation of the Federal-State Joint Board on Universal Service, the FCC issued a set of permissive guidelines for the States to use in their ETC designations, partially in response to the growing role and prominence of competitive ETCs. A major policy goal of those guidelines was to ensure that *all* ETCs used any Universal Service disbursements to invest in infrastructure and defray consumer costs in the appropriate service area. Specifically, the guidelines call for each carrier seeking ETC status to do the following:

a. Provide a five-year plan demonstrating how high-cost Universal Service support will be used to improve its coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive Universal Service support;
b. Demonstrate its ability to remain functional in emergency situations;
c. Demonstrate that it will satisfy consumer protection and service quality standards;
d. Offer local usage plans comparable to those offered by the incumbent local exchange carrier (ILEC) in areas for which it seeks designation; and
e. Acknowledge that it may be required to provide equal access if all other ETCs in the designated area relinquish their designations pursuant to Section 214(e)(4) of the Act.

The Order also encouraged States to apply a public interest standard, including consideration of a cost-benefit analysis and potential “creamskimming” effects in instances where an ETC applicant seeks designation below the study area level of a rural incumbent LEC. And to make sure the guidelines were applied uniformly, the FCC encouraged States to require annual certifications from all ETCs, even those previously designated, including progress reports on coverage and service quality improvements.

At this writing, at least 24 State commissions have either implemented the guidelines or initiated rulemakings to incorporate some or part of these suggested guidelines. There are, of course, some natural tensions to work through, such as how a State can certify compliance with service quality and consumer protection standards for some competitive ETCs if federal legislation ultimately puts jurisdiction over the terms and conditions for some carriers beyond our reach.

Contributions to Federal and State universal service.

NARUC supports efforts to more equitably distribute the funding base of the federal Universal Service Fund (USF) in a technology-neutral manner, and we appreciate provisions in HR 5072, the Universal Service Reform Act of 2006, that would empower the FCC to do so. Broadening the contribution base for universal service is not a question of how much is collected, but rather of fairness in how it is collected.

We also believe such efforts at the federal level must be accommodated by similar efforts to ensure the long-term sustainability of State programs. Today, Universal Service is a jointly shared responsibility between the States and the federal government, with 26 State programs distributing about $1.3 billion, or nearly 20 percent of the overall national commitment to Universal Service. This joint approach benefits both "net donor" and "net recipient" States because it lessens the burden on an already sizable federal program and permits another option when federal disbursement formulas that "work" in the aggregate do not adequately serve a particular State or community.

Unfortunately, State universal service funds face the same structural funding challenges as the federal program, with many new services that rely on a ubiquitous network (and exchange traffic with the PSTN) failing to contribute equitably to either one. For this reason, we believe that any efforts to expand the federal contribution base, especially to include intrastate revenues, must also clarify State authority to assess against the same broad base, including total revenues for subscribers within a State.

Preserving State programs is also a question of fairness between the states. The 1996 Act explicitly contemplated that universal needs would be met by both State and federal programs and, for this reason, did not attempt to accomplish everything through the federal program. For that reason, I suspect that if Congress ever chose not to preserve State programs, those 26 States would expect to be made whole in the federal distribution formula, creating even more upward pressure on the fund, especially on "net donor" states.

Ultimately, we believe the best solution is to stabilize the contribution base of State universal service programs at the same time the base is stabilized for the federal program, by making State USF assessment authority co-extensive with that of the federal program, allowing for the use of numbers, connections, total revenues or whichever approach is ultimately chosen. We appreciate the provisions in HR 5072 that would hold State programs harmless when the federal fund is expanded to include intrastate revenues and we look forward to working with all the members of this Subcommittee on those issues.

Intercarrier compensation: Inseparable from USF.

Finally, I'd be remiss if I didn't say a few words about intercarrier compensation, an issue that is joined at the hip with universal service and one that some people call the "elephant in the room." As the members of this Subcommittee know, the federal Universal Service Fund was created as a vehicle to eliminate implicit subsidies in the telecommunications industry and make at least some of them into explicit subsidies that could be sustained in a competitive environment. Perhaps the single largest source of those subsidies was above-cost charges to originate and terminate calls – intercarrier compensation.

Many of the accounts within Universal Service were created as part of past plans to lower access charges, such as the "CALLS" plans and the "MAG" plan, and many State universal service funds were created to reduce or eliminate implicit subsidies in intrastate access charges. Even today, the collective amount of funds received from intercarrier compensation is estimated to be around $10 billion, more than State and federal universal service programs combined.

NARUC's leaders have been brokering a dialogue among every segment of industry for almost two years, designed to produce an approach with as much consensus support as possible, especially since this is a plan that governs largely how these carriers will relate to each other economically. For today, my only caution to members of this

Subcommittee is to be aware that whatever approach is ultimately adopted by the FCC or Congress, it is likely to once again have a big impact on universal service.

Conclusion:

Beyond universal service programs, States have also taken numerous measures to encourage expeditious availability of broadband and telephonic infrastructure, including numerous bills that deregulated incumbent phone companies in return for promises to offer broadband, cooperative agreements to purchase broadband services in return for commitments to build out to surrounding business and residential areas, and in some cases, public builds of broadband infrastructure.

Ultimately, NARUC's members share each of your concerns about delivering the best, most efficient, advanced and affordable communications services to each of your communities. As you consider changes to Universal Service, both State and federal, we offer ourselves as partners, especially when it comes to impact of national policies on each individual State.